2012 WL 12123619 (Hawai'i App.) (Appellate Brief)
Intermediate Court of Appeals of Hawai'i.

David W. SWIFT, Jr., and Lois F. Swift, Plaintiffs-Appellees/Cross-Appellants,
v.
Catherine SWIFT and Jay Nelson, Defendants-Appellants/Cross-Appellees.

No. 12-0000603.
November 30, 2012.

First Circuit Court
Honorable Rom A. Trader Honorable Karen T. Nakasone
Appeal from: Amended Final Judgment, June 13, 2012

Opening Brief of Plaintiffs-Appellees/cross-Appellants David W. Swift, Jr. and Lois F. Swift Appendices A-J and Certificate of Service

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I. INTRODUCTION

Come now Plaintiffs-Appellees/Cross-Appellants DAVID W. SWIFT, JR. and LOIS F. SWIFT (hereinafter for convenience, "Swifts" or "Parents Swifts") and file this Opening Brief in support of their Cross-Appeal.

At the conclusion of the jury trial below, the jury on April 3, 2012 unanimously found "by clear and convincing evidence" that Defendants-Appellants Catherine Swift and Jay Nelson (a married couple)(hereinafter for convenience called "Nelsons" or "Defendants Nelsons") committed serious financial and physical **abuse** against Parents Swifts, who are Catherine's **elderly** parents.

***2** Sad to say, the Record of this unfortunate case is replete with the "ugly acts of the defendants." [1]

Parents Swifts pray that this Court will affirm in all respects the Amended Final Judgment which was entered on June 13, 2012, and (by virtue of this cross-appeal) to permit a (re) trial on the sole question of "punitive damages," because "punitive damages" were erroneously excluded from the jury's consideration during the first trial.

II. STATEMENT OF THE CASE

A. The Parties.

The parties to this case of multiple **abuses** are as follows:

Dr. David W. Swift, Jr., was born in 1927 in China. (Transcripts, XX/XX/2012, p. 96 (hereinafter abbreviated to "Tr. 3/23, p. 96) He served in the U.S. Army, and later obtained his Ph.D from the University of California--Berkeley. (Id., p. 101-02) Dr. Swift retired from the University of Hawaii Department of Sociology in 2010 after 44 years of teaching. (Id., p. 103) Dr. Swift has authored six books on a wide variety of significant topics during his lengthy career. (Id.; Tr. 3/22, pp. 168-69)

***3** Wife Lois F. Swift was born in 1931 in the Panama Canal Zone. (Tr. 3/22, p. 12) She received her undergraduate college degree from UC-Berkeley. (Tr. 3/22, p. 12-13) Lois Swift worked for 17 years for the State of Hawaii Department of Human Services. (Tr. 3/22, p. 74) She has been married to Dr. Swift for 58 years. (Id., p. 14)

The Swifts' only child, daughter Catherine Swift, was born in 1967 in Honolulu, Hawaii. (Tr. 3/22, p. 14) Her parents gave her a fine education, including Punahou School for six years of high school, and five years of college at Cal Tech. (Tr. 3/22, p. 105, 202-03) Catherine Swift currently works for the federal government. (Id., 201-02)

Jay Nelson, husband of Catherine Swift and son-in-law of David and Lois Swift, was born in 1956 and grew up in Iowa. (Tr. 3/19, pp. 177-78) He received his undergraduate degree from Antioch College, a graduate degree in art from Wisconsin, and another graduate degree in fish and wildlife from Texas A & M. (Id., at 178-80) He also currently works for the federal government. (Id., at 182)

B. The Factual Background Of This Case.

1. The Two Aina Haina Properties, 1970-2002.

Parents Swifts purchased their current home at 420 Hao Street (in Aina Haina Valley) in 1970. (Tr. 3/22, p. 15) The 420 Hao Street property was located on a "hill." (Tr. 3/29, pp. 84-85) From the hill, Parents Swifts had a clear view down Aina Haina Valley to the ocean and all the way eastward to Koko Head. (Tr. 3/22, pp. 15-17)

***4** Parents Swifts deeply appreciated and valued the colorful and ever-changing views of the ocean from their 420 Hao Street home. Lois Swift testified:

"Well, one of the reasons why we liked Hawaii was the ocean. That's not a surprise to us who live in Hawaii. We're not young enough to go down surfing. However, our house is situated so that we look down, and the ocean is -you know, during the storms there have been white caps when the waves roll in. The colors, you know, its grade A. The ocean is gray. If it's blue sky, it's blue. And of course we can watch the barge from - Brothers barge come from the Big Isle and then the cruise ships, and there's just always enjoyable things to watch. And my husband and I find that towards twilight is a very nice time. It's just very peaceful and very relaxing... And we can see way over to Koko Head. And, for instance, if it's rainy, Koko Head gets covered up, and when the rain goes, the magic of it is that Koko Head reappears ..." (Tr. 3/22, pp. 16-17)

The Swifts wished to preserve that view, and decided that if the occasion arose, they would purchase the lot and house adjoining their property on the makai/ocean side, with the address of 412 Hao Street. (Id., pp. 15-16) Parents Swifts hoped that by purchasing this adjoining property, they could preserve the view plane over that property all the way down to the ocean. (Tr. 3/23, p. 108) Jay Nelson admitted that he knew directly from Parents Swifts that they "valued" their view. (Tr. 3/19, p. 190)

The opportunity to purchase the 412 Property arose in 1999. (Id.) By this time, the 412 Property was "in terrible shape" and required extensive and expensive repairs. (Tr. 3/22, pp. 17-19; Tr. 3/23, pp. 151-52)

In order to purchase the Property and rehabilitate it, Parents Swifts not only took out a mortgage on their own 420 Hao Street home, but they also took early withdrawals from several of their retirement funds. (Tr. 3/22, pp. 18-19) Between their downpayment, payments for an architect ***5** and contractor, and carrying the mortgage payments during rehabilitation (when the house could not be rented), Parents Swifts invested and spent approximately $302,000 on the 412 Hao Street property. (Tr. 3/22, pp. 18-19, 184; Tr. 3/23, p. 109) On top of those expenses, Parents Swifts paid $28,000 to the IRS for the early withdrawal of their retirement funds. (Tr. 3/22, p. 184)

2. The January 2002 - February 2004 Time Period.

At the time the 412 Hao Street property came on the market, Defendant Catherine Swift was living at home with her parents, sporadically paying rent, and looking for a job at age 31. (Tr. 3/22, p. 17) Wanting their daughter to establish a "financial track record," (Exhibit 1, third page) the Swifts decided to put Catherine on title for 1% of the 412 Property, to give her (hopefully) some business knowledge and a "sense of responsibility." (Id.; Tr. 3/23, p. 109)

Later, in 2002, as the interior finish work continued, daughter Catherine and her then-boyfriend, Defendant Jay Nelson received assent from Parents Swifts to occupy the 412 Property if the young couple would pay the mortgage on the 412 Property in lieu of rent, and the mortgage was probably lower than the prevailing rental price. (Tr. 3/23, pp. 156-57; Tr. 3/22, p. 22)

In 2002, no changes had been made in the respective ownership interests: Parents Swifts still owned 99% of the 412 Property, and Catherine had her nominal 1% ownership. Parents Swifts denied that they ever told Nelsons that the 412 Property was to be "given" to them. (Tr. 3/23, p. 110) There were no "gift letters" reflecting any gift from ***6** Parents Swifts to the Nelsons. (Tr. 3/29, pp. 47-48) In fact, there were no writings anywhere in the Record that reflected that Parents Swifts intended to "gift" the 412 Hao Street property to the younger couple. (R. 1-end) [2]

During this period, Parents Swifts were still "uneasy" about their view plane over the 412 Property because no view plane easement had been reduced to writing. (Tr. 3/23, pp. 111-12)

To protect their concerns, Parents Swifts consulted a Honolulu attorney (Kenneth A. Martyn) who drew up a proposed, comprehensive Agreement in April 2003. (Exhibit 5; Tr. 3/22, pp. 21-27; Tr. 3/23, pp. 112, 114) This Agreement provided for the Nelsons to repay Parents Swifts $247,000 for the 412 Property, and it also provided a perpetual view easement over the 412 Property in favor of Parents Swifts' 420 home. (Exhibit 5) The Agreement was presented to Jay and Catherine, but they declined to sign it because they claimed the view plane easement might lower the value of the 412 Property. (Tr. 3/23, p. 112, 114)

In early 2004, Attorney Martyn was asked to draft a slightly-modified Agreement, which provided that the view plane easement would expire on the death of the last of David and Lois Swift. (Exhibit 7; Tr. 3/22, p. 27) However, before this modified Agreement could even be completed, important events intervened.

3. The Fraud Begins In 2004.

***7** In lieu of monthly rent, Catherine and Jay had been paying the original first mortgage on the 412 Hao Street property taken out in 1999 by Parents Swifts. (Tr. 3/22, p. 22)

Through early 2004, Catherine and Jay informed Parents Swifts that lower mortgage interest rates had become available, and that they (Catherine and Jay) would like to lower their monthly expenses by obtaining a new mortgage. (Tr. 3/19, pp. 206-07; Tr. 3/23, p. 111) Parents Swifts were "willing" to assist the Nelsons to refinance the 412 Property. (Tr. 3/23, p. 111)

Soon after, Parents Swifts were approached by the Nelsons' agent (one Kristi Wells) with the news that, in order to qualify for a new first mortgage on the 412 Hao Street property, Catherine and Jay would have to be "owner-occupants." (Tr. 3/22, pp. 186-87) This would require a deed temporarily conveying 99% of the 412 Property from Parents Swifts to Catherine and Jay, so that Catherine and Jay would own 100%. (Tr. 3/22, pp. 29)

Parents Swifts were assured that their 99% interest would be returned to them after the refinancing. (Tr. 3/23, p. 118, 145) Indeed, Parents Swifts were told that getting the 99% deeded back to them "instantly" after the refinancing could be "easily" done. (Tr. 3/22, p. 29, 33, 166-167, 186-87)

Importantly, Kristi Wells, the mortgage broker for Catherine and Jay, admitted that she could not "remember" what representations she had made to Parents Swifts, and therefore she could not contradict the testimony of Parents Swifts. (Tr. 3/29, pp. 47)

In reliance upon and "trusting" the representations of the Defendants and Kristi Wells, on March 1, 2004 Parents ***8** Swifts signed a deed transferring their 99% interest in the 412 Property over to Catherine and Jay. (Exhibit 18; Tr. 3/23, p. 118, 145, and 172) The deed was recorded at the State of Hawaii Bureau of Conveyances two days later, on March 3, 2004. (Id.)

Parents Swifts have never received back their 99% ownership of the 412 Property, despite the passage of over eight (8) years. (R. 1-end)

4. The Fraud Continued Into 2006

Still seeking to get a written confirmation of their View Plane Easement over the 412 Property, Parents Swifts on July 23, 2004 (along with daughter Catherine) signed a document entitled "Grant Of View Easement Encumbrance That Encumbers Lot 700, And Benefits Lot 701, Of Map 37 Of Land Court Application 656" (hereinafter "Easement Agreement")(Exhibit 17)(Tr. 3/20, p. 83; Tr. 3/23, pp. 148-49) The Easement Agreement was phrased to preserve the ocean view from the Parents' home at 420 Hao Street over the 412 Property. (See Exhibit 17) However, the Easement Agreement could not be recorded under the strict Land Court rules because by now Jay Nelson was married to Catherine Swift. (Id.)

5. The Fraud Continued When The Parents Sought To Regain Their 412 Property, Or The Equivalent Value And A View Easement.

By February 2006, Parents Swifts realized that they had never received a return deed from Catherine and Jay. Consequently, David Swift wrote a short letter to Catherine and Jay, wherein he reiterated the 2004 understanding that ***9** the "title transfer would be TEMPORARY." (Exhibit D-16; see Appendix A attached hereto, a true copy of Exhibit D-16) In the same letter, David Swift also used the term "false pretenses" to describe the manner in which the 412 Property had been taken from them in 2004. (Id.)

Reacting to the facts stated in the February 2006 letter, Jay Nelson "in a rush" (Tr. 3/20, p. 60) prepared an "Agreement by Catherine Swift and Jay Nelson to pay the Remaining Mortgage Balance in its entirety on the 420 Hao Street property, Honolulu, owned by David and Lois Swift, Beginning at the time of David Swift's Retirement" (hereinafter called, for convenience' and functional sake, the "Promissory Note") (Id., at 62) (Exhibit D-9) (see Appendix B attached hereto, a true copy of Exhibit D-9)

Notably, Jay Nelson in the Promissory Note characterized (at least three times) that the $250,000 invested in the 412 Property had been “loaned” by Parents Swifts to Catherine and Jay. Catherine Swift, Jay Nelson and David W. Swift signed the Promissory Note on March 2, 2006, while Lois Swift signed the Promissory Note on March 3, 2006. (Exhibit D-9; Appendix B)

By virtue of the Promissory Note drafted by Jay Nelson, Parents Swifts were promised the repayment of $250,000, representing their “retirement and other savings” initially invested into the 412 Property. The repayment of the $250,000 was to be made by Catherine and Jay in the following manner: beginning on the date that David W. Swift retired from the University of Hawaii, Catherine and Jay would assume and begin to pay Parents Swifts' then-existing monthly first mortgage payments on the Parents' 420 Hao ***10** Street home.[3] The Promissory Note ended with a written assurance that Nelsons would “fully comply” with the wishes of Parents Swifts. (Exhibit D-9; Tr. 3/22, p. 38)

What is more, David Swift's February 2006 letter (Exhibit D-16) also prompted Jay Nelson to promise Parents Swifts that he (Jay Nelson) would draft and sign a View Plane Easement Agreement guaranteeing that Parents Swifts would always enjoy their ocean views over the 412 Property. (Tr. 3/22, pp. 36-37) Defendant Nelson admitted under oath that he had made this promise to Parents Swifts. (Tr. 3/20, pp. 95-96)

Based upon the written Promissory Note for $250,000 and Jay Nelson's promise to draft and sign a View Plane Easement, by March 2006 Parents Swifts were “relieved.” (Tr. 3/22, p. 39)

6. The Fraud Is Uncovered In 2011

To their great dismay, Parents Swifts discovered that they were not able to rely on the signatures, or promises, of Catherine Swift and Jay Nelson.

David W. Swift retired from the University of Hawaii as of June 1, 2010 after 44 years of continuous service. (Tr. 3/23, p. 103; Tr. 3/20, pp. 97-98) Catherine attended her father's gala retirement party at the UH, along with the rest of the Nelsons. (Id.)

However, despite David Swift's retirement, Catherine and Jay did not begin to pay Parents Swifts' first mortgage payments on the 420 Hao Street residence, as set forth in ***11** the Promissory Note. Not one “penny” has been paid. (Tr. 3/22, p. 68-69)

After the passage of over seven months without payment, Parents Swifts on January 9, 2011 wrote a reminder letter to Catherine and Jay, reminding them of their written obligation set forth in the Promissory Note, and advising them that they were already behind in their monthly payments of Parents Swifts' mortgage. (Exhibit 13; Tr. 3/23, pp. 121-22) (see Appendix C attached hereto, a true copy of Exhibit 13)

Catherine and Jay responded most harshly, with a letter dated January 25, 2011. (Exhibit D-18) (See Appendix D attached hereto, a true copy of Exhibit D-18) That letter contained the type-written signatures of both “Jay T. Nelson” and “Catherine E. Swift.” (Id.) The letter denied that any “loan” had ever been made by Parents Swifts to Catherine and Jay. The letter argued that Catherine and Jay had never received “notification” that the monthly payments were supposed to begin. (Id.) The letter denied that arrearages were owed to Parents Swifts. (Id.) The letter concluded with a not-so-subtle threat that the “family” would not remain “intact” unless Parents Swifts relented on their request for payment. (Id.)

The harsh tenor of Defendants Nelsons' letter is matched by the fact that Defendants Nelsons have made no repayment of the $250,000--not even one “penny”--to Parents Swifts. (R. 1-end)

7. Catherine's Physical **Abuse** Of Her Mother As if the financial **abuse** of the **elderly** Parents Swifts were not enough, there was also physical **abuse**.

***12** On September 30, 2010 David Swift was involved in an auto accident, not caused by him. (Tr. 3/22, p. 44) His injuries were quite serious, caused him a great deal of pain, and resulted in his face and mouth being wired. (Id., at 44-45)

David Swift endured a painful recovery at home. Daughter Catherine vociferously objected to the home care being given to David Swift, calling the care no better than that given a "guinea pig." (Tr. 3/22, p. 45) Claiming that she knew better than anybody else "who" should care for David Swift, Daughter Catherine in an angry rage threw a hard plastic cup full of water at her mother, Lois Swift, from a short distance of four to five feet. (Id., at 45, 47-48) Catherine threw the cup at her mother overhand. (Tr. 3/23, p. 131) The cup of water struck Lois Swift on the top of her head, causing profuse bleeding and a significant and painful knot where it struck. (Tr. 3/22, at 49, 53) Catherine Swift then exclaimed, "Oh, my God-- **abuse**!" (Tr. 3/23, p. 131) David Swift witnessed Catherine's assault and spontaneous utterance from very close range. (Id. at 130)

Lois Swift had been the main caregiver for her recovering husband, and this injury inflicted by Daughter Catherine caused her husband's home care to be "more complicated." (Tr. 3/22, p. 128)

The above chronology reflects the compelling, even vivid, evidence which was presented to the jury. Parents Swifts' testimony was strongly corroborated by the writings and other documentary materials admitted into evidence, and also by the admissions (albeit begrudging) of both Catherine Swift and Jay Nelson.

***13** C. The Procedural Background Of This Case

In early 2011, Parents Swifts were faced with the permanent loss of a major portion of their retirement savings (which had been invested into the 412 Property), as well as the permanent loss of their View Plane Easement. Furthermore, Lois Swift had suffered the added indignity (and pain) of being assaulted in her own home by her only child (for whom Parents Swifts had sacrificed greatly).

Consequently, in order to regain their retirement savings, preserve their cherished view, and otherwise protect themselves and their interests, Parents Swifts found it absolutely necessary to file this lawsuit. Most pertinent for purposes of this cross-appeal are the following litigation events:

Parents Swifts instituted this lawsuit on March 23, 2011. In the Complaint, they alleged fraud, breach of contract, breach of fiduciary duties, unjust enrichment, assault and battery (against Catherine Swift), and negligence. (Record, Part I, p. 36, hereinafter abbreviated to "R. I, p. 36) The Complaint expressly requested "special, general and punitive damages." (Id.) The Complaint also sought imposition of a constructive trust upon the 412 Hao Street property to preserve it, and further, the imposition of an equitable lien over the 412 Property in order to preserve Parents Swifts' view. (Id.)

On April 14, 2011, Defendants Catherine Swift and Jay Nelson filed their Answer. (R. I, p. 54) Although Defendants raised at least eighteen (18) separate defenses, Defendants never once claimed that they had been "gifted" ***14** (or words to that effect) the 412 Property. [4] (Id.) Furthermore, the Defendants never raised "mistake" or "misunderstanding" or any other such defense to the Parents' lawsuit. (Id.)

On December 20, 2011 Judge Karen T. Nakasone ruled as a "matter of law" that the Defendants had breached a contract the Promissory Note for $250,000) which Catherine Swift and Jay Nelson had executed in favor of Plaintiffs. (R. I, p. 423) The question of damages arising from that breach of contract was left to the later determination of the jury.

On January 30, 2012, Nelsons filed "Defendants Catherine Swift & Jay Nelson's Motion For Summary Judgment As To The Claim For Punitive Damages In The Complaint Filed 3/23/11." (R. I, p. 779)

The Nelsons' Motion was intended to eliminate Parents Swifts' claims for "punitive damages." Following oral argument on February 28, 2012, the Lower Court granted the Summary Judgment Motion as to Plaintiffs' Count 1 (breach of contract), but the Lower Court denied the Motion as to Count 2 (fraudulent misrepresentations), Count 3 (unjust ***15** enrichment), Counts 4 and 5 (assault and negligence), and Count 6 (breach of fiduciary duty). (R. I, p. 11) [5]

On February 27, 2012, Appellants filed their Motion in Limine #6 to preclude Parents Swifts from mentioning the phrase "punitive damages" during trial. (R. II, p. 166) Despite the fact that Appellants cited no on-point or even similar precedent, the Trial Court nevertheless granted the motion. (R. II, p. 1149)

The jury trial began on March 19, 2012 before Judge Karen T. Nakasone.

On March 23, 2012, following the presentation of Plaintiffs-Appellees' evidence, the Swifts rested their case. (Tr. 3/23/12, p. 180) The Nelson Defendants made their Rule 50 motion for "judgment on the law." (***16** Id., at 182-209) In particular, the Nelson Defendants sought JMOL as to Count 2 (fraud), Count 3 (unjust enrichment) and Count 6 (breach of fiduciary duties). (Id., at 187-190) The Nelson Defendants also sought JMOL, and argued especially hard, in support of their recently-raised defenses of "statute of limitations" and "statute of frauds." (Id., 182-187; 200-206)

Following extensive argument, the Trial Court denied their Motion for JMOL. (Id., at 209) In denying the Rule 50 JMOL, the Trial Court concluded:

"There are hotly contested credibility issues that the Court determined are pertinent to what appears to be all of the claims, and so since the Court has to view the evidence and the state of the record in the light most favorable to the nonmovants, and based on the points raised by Mr. Benco, the Court will deny the Defense's motions and the matters will-in their entirety will be submitted to the jury. And so the motion for the judgment as a matter of law is denied." (Id., at 209; see Appendix E attached hereto, a true copy of the Court's denial of the JMOL Motion)

What is particularly notable is the fact that the Swifts' claims for "punitive damages" were never challenged by the Defendants Nelsons in their mid-trial Rule 50 Motion. Indeed, the phrase "punitive damages" was never even mentioned by Defendants Nelsons in their motion. (Tr. 3/23/12, pp. 180-209) Thus, at the most critical time, i.e., after Parents Swifts rested their case, the Trial Court was never asked to grant JMOL as to Parents Swifts' "punitive damages" claims.

However, when the trial resumed on March 28, 2012, the Trial Court suddenly on its own initiative granted JMOL as to "punitive damages" with regards to Count 3 (unjust enrichment), Count 5 (assault) and Count 6 (breach of fiduciary duty). (Tr. 3/28/12, pp. 2-13) (JMOL was not ***17** granted as to Parents Swifts' claims for "punitive damages" arising out of their fraud claims; nevertheless, Parents Swifts and their attorney were still precluded from mentioning the term "punitive damages.")

Defendants Nelsons rested on March 29, 2012, at the conclusion of Catherine Swift's testimony. (Tr. 3/29/12, p. 144) Immediately thereafter, Defendants Nelsons renewed their Rule 50 Motion for Judgment as a Matter of Law. (Id., at 149) After brief argument, the Trial Court denied the renewed JMOL as to fraud. (Id., at 152) [6]

The Trial Court then took up the final phase of approving/rejecting jury instructions. (Id., at 153-203) In particular, Swifts had proposed Standard Court Jury Instructions 8.12, 8.13, 8.14, 8.15, 8.16 and 8.17, all dealing with "punitive damages," but the Trial Court rejected those proposed Instructions. (Id., at 165-66; see Appendix F, proposed Instructions 8.12, 8.13, 8.14, 8.15, 8.16 and 8.17; also see Appendix G, a true copy of the relevant transcripts) The Trial Court also rejected Swifts' proposed Jury Instructions P-3, P-10 and P-25, which also dealt with "punitive damages." (Id., at 178, 184; see Appendix H, a true copy of proposed Instructions P-3, p-10 and P-25; see also Appendix I, a true copy of the relevant transcripts)

On April 3, 2012, following deliberations, the jury rendered a Special Verdict in favor of Parents Swifts. (Tr. 4/3/12, pp. 2-7) In point of fact, the jury found for Parents Swifts on all issues, i.e., fraudulent misrepresentation, unjust enrichment, breach of fiduciary ***18** duties, negligent infliction of injuries, and special damages for breach of contract. (R. II, p. 1121)

Immediately following the jury's strong verdict, and while the jurors were still empanelled, Swifts once more asked the Trial Court to submit the issue of "punitive damages" to the jury. (Tr. 4/3/12, pp. 14-15) This last effort to submit the issue of "punitive damages" was denied by the Trial Court. (Id., at 15) (See Appendix J, a true copy of the relevant transcripts)

On April 11, 2012 Trial Judge Nakasone signed and filed a Judgment herein which awarded a total of $453,326.97 against both Nelson Defendants and in favor of Parents Swifts, and an additional $3,000 in favor of LOIS F. SWIFT and against CATHERINE SWIFT for the cup-throwing wrong. (R. II, p. 1130)

Timely post-trial motions were filed by both the Nelsons and Parents Swifts. (R. II, pp. 1161-1299) All of the post-trial motions were heard and decided by the Trial Judge, and appropriate Orders were filed. (R. II, pp. 1506-1537) One of the post-trial Orders granted Parents Swifts a portion of their attorney's fees ($8,265.39) based upon the breach of contract claim, along with court costs incurred ($1,406.14). (R. II, p. 1531)

Following entry of the above post-trial orders, the Trial Judge filed an Amended Final Judgment on June 13, 2012 awarding total damages of $462,998.50 against Defendants Nelsons, and an additional $3,000 in favor of Plaintiff LOIS F. SWIFT and against Defendant CATHERINE SWIFT. (R. II, p. 1538)

On June 27, 2012 Defendants-Appellants filed a Notice of Appeal herein. (R. II, p. 1542) On June 28, 2012, ***19** Plaintiffs-Appellees filed a Notice of Cross-Appeal herein. (R. II, p. 1553)

III. POINTS OF ERROR

1. The Trial Court erred when, mid-trial, it granted Defendants' Rule 50 "Motion for Judgment as a Matter of Law" dismissing Parents Swifts' "punitive damages" claims arising out of the unjust enrichment, breach of fiduciary duties, and assault claims. (Tr. 3/28/12, pp. 2-13) Parents Swifts contested every aspect of the Trial Court's ruling. (Id.) Indeed, on the immediately preceding trial date, the Court had expressly denied Defendants' Rule 50 Motion, noting that all issues were "hotly contested." (Tr. 3/23/12, pp. 209; Appendix E)

2. The Trial Court also erred when it refused Parents Swifts' proposed "punitive damages" instructions related to Parents Swifts "fraud" claims. (Tr. 3/29/12, pp. 165-66, 178, 184) The rejected Jury Instructions on "punitive damages" (8.12, 8.13, 8.14, 8.15, 8.16, 8.17, P-3 P-10 and P-25) are quoted in full in Appendix F and also in Appendix H attached hereto. The evidence supporting the "fraud" claims was strong, and indeed compelling. Parents Swifts noted their objections to the rejection of these "punitive damages" instructions on the Record. (Id., at 165-166, 178, 184) The Trial Court acknowledged Parents Swifts' objections. (Id., at 165-166, 178, 184)

IV. STANDARDS OF REVIEW

1. A trial court's ruling on a HRCP Rule 50 motion for judgment as a matter of law is reviewed de novo. ***20** Miyamoto v. Lum, 104 Haw. 1, 6-7, 84 P.3d 509, 514-15 (2004) (citing In re Estate of Herbert, 90 Haw. 443, 454, 979 P.2d 39, 50 (1999)). "A [motion for judgment as a matter of law] may be granted only when after disregarding conflicting evidence, giving to the non-moving party's evidence all the value to which it is legally entitled, and indulging every legitimate inference which may be drawn from the evidence in the non-moving party's favor, it can be said that there is no evidence to support a jury verdict in his or her favor." Id. at 7, 84 P.3d at 515 (quoting Tabieros v. Clark Equipment Co., 85 Haw. 336, 350, 944 P.2d 1279, 1293 (1997)). (Applicable to Point of Error #1, supra)

2. The standard of review for jury instructions on appeal looks to whether the instructions are prejudicially insufficient, erroneous, inconsistent, or misleading. Erroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial. In other words, error is not to be viewed in isolation and considered purely in the abstract." State v. Behrendt, 124 Haw. 90, 102, 237 P. 3d 1156, 1168 (Haw. 2010); Kobashigawa v. Silva, 126 Haw. 62, 66, 266 P. 3d 470, 474 (Haw. App. 2011); Nelson v. Univ. of Hawaii, 97 Haw. 376, 386, 38 P.3d 95, 105 (Haw. App. 2001). (Applicable to Point of Error #2, supra)

V. ARGUMENT.

The facts of this case are so egregious and so reprehensible that they clearly warranted submission of the claims for punitive damages to the jury.

Yet, the Trial Court ignored the egregious evidence of serious **elderly abuse** (both financial and physical), and ***21** instead granted a Rule 50 JMOL against Swifts' claim for punitive damages arising from Defendants' "unjust enrichment," "breaches of fiduciary duties," and (at the very least) "gross negligence" (the cup-throwing attack).

What is more, despite the compelling evidence of "fraud" and financial trickery by the Nelson Defendants over several years, the Trial Court refused to submit the proposed Jury Instructions regarding "punitive damages" to the jurors even where the "fraud" instructions were given.

Those rulings by the Trial Court were totally erroneous, and require a reversal and remand for a new trial on the sole issue of "punitive damages."

A. The Trial Court Erred When It Granted The Rule 50 JMOL Motion As To "Punitive Damages," Where The Evidence And All Legitimate Inferences Therefrom Showed That "Punitive Damages" Were Justified Because Of The Defendants' Egregious Conduct Which Resulted In Jury Findings Of Unjust Enrichment, Breach Of Fiduciary Duties, And Infliction Of Personal Injury.

1. Defendants Nelsons' Rule 50 Motion Failed To Challenge The Sufficiency Of The Evidence As To "Punitive Damages," And Thus Defendants "Waived" That Challenge.

First, Hawaii's Supreme Court has consistently held that party-defendants have "waived" their Rule 50 JMOL motions regarding specific claims, where their Rule 50 motions do not challenge the sufficiency of the evidence as to those specific claims. Ray v. Kapiolani Medical Specialists, 125 Haw. 253, 267, 259 P.3d 569, 583 (Haw. 2011); You Goo Ho v. Yee, 43 Haw. 330 (1959).

Thus, for example, in its 1943 You Goo Ho decision, the Supreme Court expressly noted:

***22** "A motion for a directed verdict [now called a motion for judgment as a matter of law] may include the question of causation. But on this appeal, appellant is precluded from asserting that his motion for a directed verdict included that question... Appellant moved for a directed verdict at the close of appellee's case in chief and again at the end of the trial. The argument of appellant's counsel on the motion covers 12 pages of the transcript. In those 12 pages not a word appears on the question of causation. (Emphasis added) 43 Haw. at 330.

Similarly in the instant case, during Defendants Nelsons' lengthy, 27-page mid-trial argument on their Rule 50 Motion, they never once challenged the sufficiency of the evidence as to "punitive damages." Indeed, they never even mentioned the phrase "punitive damages." (Tr. 3/23/12, pp. 192-209) Thus, Defendants Nelsons' "waived" their challenge to the sufficiency of the evidence regarding "punitive damages."

2. The Trial Court Erred In Sua Sponte Raising And Granting JMOL As To The Punitive Damages Claims Arising Out Of Parents Swifts' Claims For Unjust Enrichment, Breach Of Fiduciary Duties, And The Cup-Throwing Assault.

After properly and unequivocably denying Nelsons' mid-trial Motion For JMOL on March 23, 2012 (Tr. 3/23/12, p. 209), the Trial Court on March 28, 2012 surprised Parents Swifts by sua sponte raising and granting a JMOL as to "punitive damages" arising out of Parents Swifts' claims for unjust enrichment, breach of fiduciary duties, and the cup-throwing assault. (Tr. 3/28/12, pp. 2-13)

The Hawaii Supreme Court has previously ruled that trial courts cannot sua sponte raise or grant Rule 50 motions where those motions are not raised by the defending ***23** parties. Stahl v. Balsara, 60 Haw. 144, 150-51, 587 P. 2d 1214-15 (1978), citing State v. Midkiff, 55 Haw. 190, 192, 516 P. 2d 1250, 1252 (1973) [7]

Various federal appellate courts have likewise ruled that district courts do not have the authority to sua sponte grant Rule 50 motions on issues not raised by the parties Doe v. Celebrity Cruises, Inc., 394 F.3d 891, 903 (11th Cir.2004).

Here, the Trial Court erred when it, sua sponte, raised and granted JMOL against "punitive damages," because that issue had never been mentioned or argued by Defendants Nelsons.

3. In Any Event, Based Upon The Strong Evidence In The Record, The Trial Court Erred In Granting JMOL On "Punitive Damages" As To Unjust Enrichment, Breach Of Fiduciary Duties, And The Cup-Throwing Assault.

Even assuming arguendo that the Trial Court did not err by ruling sua sponte, a Rule 50 Motion for Judgment As A Matter Of Law (or JMOL)(formerly called a motion for directed verdict) can only be granted where, after disregarding conflicting evidence, giving to the non-moving party's evidence all the value to which it is legally entitled, and indulging every legitimate inference which ***24** may be drawn from the evidence in the non-moving party's favor, it can be said that there is no evidence to support a jury verdict in his or her favor. Miyamoto v. Lum, 104 Haw. 1, 6-7, 84 P.3d 509, 514-15 (2004); In re Estate of Herbert, 90 Haw. 443, 454, 979 P.2d 39, 50 (1999)); Tabieros v. Clark Equipment Co., 85 Haw. 336, 350, 944 P.2d 1279, 1293 (1997).

In the instant case, the evidence clearly reflected and suggested that Defendants Nelsons acted with intentional, malicious and/or reckless "states of mind." Consequently, the Court should not have granted the Rule 50 Motion as to Parents Swifts "punitive damages" claims.

First, the evidence was overwhelming that Defendants Nelsons were "unjustly enriched" when Parents Swifts transferred their substantial investment in the 412 Property to them. Nelsons' continued possession of the 412 Property, and their refusal to return the 99% interest back to the Parents, was without justification and thereby fulfilled the legal definition of "unjust enrichment." See, e.g., Durette v. Aloha Plastic Recycling, Inc., 105 Haw. 490, 100 P.3d 60 (2004)(having been conferred a benefit, and unjustified retention of that benefit).

Second, the egregious facts and favorable inferences therefrom strongly supported Parents Swifts' claim for "breach of fiduciary duties" and submission of the "punitive damages" question to the jury. Defendants Nelsons clearly **abused** Parents Swifts' trust in them. The net result: Defendants Nelsons obtained Parents Swifts' 412 Property (i.e., half of their retirement funds), and Nelsons also retained Parents Swifts' 412 Property for their own financial advantage. See, e.g., Kunewa v. Joshua, 83 Haw. 65, 924 P. 2d 559 (Haw. App. 1996) (under ***25** very similar circumstances, son's breach of fiduciary duties warranted punitive damages)

Finally, the evidence clearly showed and inferred that Defendant Catherine Swift deliberately, or recklessly, or with gross negligence threw the hard plastic cup containing water at her mother. Immediately after striking her mother with the cup, Catherine exclaimed, "My God - **elderly abuse**!" A reasonable juror could find that the incident was a deliberate, or reckless,

or grossly negligent assault, and a reasonable juror could therefore have reasonably awarded punitive damages based upon the conduct (and the spontaneous utterance). Vasconcellos v. Juarez, 37 Haw. 364 (1946)(punitive damages awarded for civil assault)

The Trial Court clearly erred in granting the JMOL as to "punitive damages."

B. The Trial Court Erred When It Refused Parents Swifts' "Punitive Damages" Instructions Arising Out Of Nelsons' Fraudulent Misrepresentations.

The Trial Court erred when it refused nine (9) of Plaintiffs Swifts' proposed Jury Instructions: 8.12, 8.13, 8.14, 8.15, 8.16, 8.17, P-3, P-10 and P-25. (See Appendix F) The evidence of Nelsons' fraud pervades the entire record of this trial.

Hawaii's appellate courts have discussed the important topic of "punitive damages" on numerous occasions. See, e.g., Masaki v. General Motors Corp., 71 Haw. 1, 6, 780 P. 2d 566, 570 (Haw. 1989) (holding that punitive damages are awarded "when the egregious nature of the defendant's conduct makes such a remedy appropriate" and where the wrongful conduct "has the character of outrage frequently ***26** associated with crime"); Bright v. Quinn, 20 Haw. 504, 511-12 (1911)(punitive damages may be awarded where defendant "has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations"; or where there has been "some wilful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences"); Kang v. Harrington, 59 Haw. 652, 660, 587 P. 2d 285, 291 (1978) (punitive damages "act as a means of punishment to the wrongdoer and as an example and deterrent to others"); Kaopuiki v. Kealoha, 104 Haw. 241, 257, 87 P. 3d 910, 926 (Haw. App. 2003) (dual purposes of punitive damages are for punishing the defendant for aggravated misconduct, and deterring the defendant and others from engaging in like conduct in the future")

Here, Nelsons made repeated, material, and fraudulent representations to Parents Swifts, much to the Parents' detriment. First, Nelsons basically stole Parents Swifts' entire equity in the 412 Property. That equity was worth over $300,000, and thus Nelsons' conduct was the civil equivalent of a first-class felony under Hawaii law.

Furthermore, the Nelsons basically stole the cherished and valuable view plane easement from Parents Swifts, which the jury valued at $55,000. In 2006, Jay Nelson lied when he represented to the Swifts that he would draft and sign another view plane agreement. Again, the Nelsons' conduct was the civil equivalent of a first-class felony under Hawaii law, and clearly warranted punitive damages instructions.

Again in 2006, the Nelsons committed the civil equivalent of yet another felony by giving Parents Swifts a worthless Promissory Note for $250,000, at the same time ***27** never intending to repaying the Note. This fraud should also have prompted the Trial Court to give the punitive damages instructions.

In summary: the Trial Court seriously erred when it refused to give Parents Swifts' proposed "punitive damages" instructions based upon the repeated frauds. In light of the repeated and costly (to the Swifts) misrepresentations, the Trial Court's refusal to instruct is well-nigh unfathomable.

This Court should therefore reverse the Trial Court, and grant a limited new jury trial against the Nelsons on the sole issue of punitive damages, liability having been established beyond purview. Dias v. Vanek, 67 Haw. 114, 118, 679 P.2d 133, 136 (1984); see generally Cozine v. Hawaiian Catamaran, Limited, 49 Haw. 267, 414 P. 2d 428 (Haw. 1966).

C. The Relative Degree Of The Nelsons' "Taking" And "Keeping" Should Have Prompted Denial Of The Rule 50 JMOL Motion, And The Giving Of Parents Swifts' Fraud Instructions To The Jury.

What makes the Trial Court's rulings as to “punitive damages” particularly difficult to understand is the degree, or extent, of the Nelsons' “taking” and “keeping.”

Strictly speaking, the jury's award was $453,326.97. This represented a substantial portion of the Parents' retirement savings; the potential loss of the Parents' valuable ocean view; the total loss of trust in their daughter and son-in-law; and the pain and indignity of an assault right in their own home.

By comparison, the plaintiff suffered a minor loss in Howell v. Associated Hotels, Ltd., 40 Haw. 492 (1954). ***28** There, 18 transparencies were withheld from the plaintiff without justification, no special damages were awarded, and the award of $1,850 in “punitive damages” was affirmed by the Supreme Court.

And, similarly, in Lane v. Yamamoto, 2 Haw. App. 176, 628 P. 2d 634 (Haw. App. 1981), where a prosecutor retained an individual's gun and would not return it, the Intermediate Court of Appeals ruled that “punitive damages, as well as actual damages, are allowable against that person [the prosecutor].” 2 Haw. App. at 178.

In light of the above and other similar Hawaii holdings, where the initial takings are minimal, it is difficult to understand how the Nelsons were not subjected to “punitive damages” where they have held onto, and deliberately failed to return, the deed for 99% of the 412 Property; or, alternatively, where they have refused to repay “one penny” of the $250,000 Note and acknowledge in writing the Parents' view easement over the 412 Property.

The degree and extent of the “taking” and “keeping” by Nelsons should have justified the issue of “punitive damages” being submitted to the jury below.

VI. CONCLUSION

The facts presented below clearly established the basis for submitting the question of “punitive damages” to the jury. The actions of the Nelsons were deplorable and, indeed, reprehensible. Parents Swifts are entitled to those inferences.

The Trial Court erred in granting the Rule 50 JMOL as to punitive damages arising out of the unjust enrichment, breach of fiduciary duties, and inexcusable cup-throwing conduct. Furthermore, the Trial Court erred in refusing to

Appendix not available.

Footnotes

1 The phrase “ugly acts of the defendants” was coined by Circuit Judge Hawkins, writing in dissent in a Vietnam-era protest case. State v. Butler, 51 Haw. 180, 455 P. 2d 4, 194 (Haw. 1969)(Hawkins, J., dissenting) Although the instant case arose in an entirely different setting (a family setting), Judge Hawkin's description of the defendants' conduct herein is particularly apt.

2 As late as the refinancing of the 412 Property in 2004, the Nelsons' own mortgage broker never heard the word “gift” being used in association with the transfer of the 412 Property. (Tr. 3/29, p. 45)

3 In early 2006, David Swift was 80 years old and completing his 40th year of continuous service to the University of Hawaii's Sociology Department. Retirement was therefore clearly foreseeable.

4 At the very outset of this case, Appellants Catherine Swift and Jay Nelson were represented by a different law firm. That first law firm presumably deemed the affirmative defense of “gift” to have been specious in light of the March 2, 2006 written agreement (Exhibit D-9) wherein Appellants agreed to pay Parents Swifts $250,000. Similarly, the first law firm presumably deemed the assertion of “mistake” or “misunderstanding” to have been specious in light of Exhibit D-9.

5 The HAJIS Case Summary Sheet reflects the following occurred during the February 28th hearing:
“After hearing arguments, the Court granted and denied in part Deft's Motion for Summary Judgment. As to Count 1 (breach of contract) claim, as there is no claim for punitive damages, the court is not making any ruling.

As to Counts 2, 3 & 6 (fradulent (sic) misrepresentation, unjust enrichment and breach of fiduciary duty), the Court will deny with respect to the claims based on the promise or representations of the 99% interest. It is for the jury to determine if punitive is warranted.
As to Counts 4 and 5 (cup assault), the Court will deny, the question of punitive oes to the jury.
The Court clarified that it is granting in part motion for punitive damages stemming from the 2006 promissory note. Court deemed breach of contract analysis pertinent to that claim and there are no punitive damages for breach of contract.
Court further clarified at Pltff's request that the Court is denying as to the 99% and view claims.
Mr. James Monma directed to prepare an Order." (R. I, 8-9)
Although not necessarily material to the merits of this appeal, since the summary judgment was mostly denied, no order was ever prepared.

6 By denying this post-trial Rule 50 Motion, the Trial Court implicitly found sufficient/substantial evidence of fraud having been perpetrated by Defendants Nelsons.

7 Hawaii's Supreme Court has ruled that where a party which is unrepresented at trial, a court can properly grant a Rule 50 motion even where the Rule 50 motion is made by another party to the case. Espanola v. Cawdrey Mars Joint Venture, 68 Haw. 171, 181, 707 P. 2d 365, 372 (1985). The Supreme Court termed this situation "filling an empty chair." By contrast, in the case at bar, where Defendants Nelsons had a team of four attorneys sitting at trial, this could hardly be called an "empty chair" situation.

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